



EPA Proposes Listing Two PFAS as Hazardous Substances

09.01.2022 | By [Alexander J. Van Roekel](#)

Update

On September 6, 2022, the proposed rule was published in the Federal Register. This publishing initiates the 60-day comment period. Comments are due by **November 7, 2022**.

On August 26, 2022, the Environmental Protection Agency (EPA) issued the pre-publication of a proposed rule that would designate perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (commonly referred to as Superfund). The EPA press release describes the action as one to “to protect people and communities from the health risks” of PFOA and PFOS.

EPA’s action is part of President Biden’s strategic roadmap to address per- and polyfluoroalkyl substances (PFAS). PFAS, of which PFOA and PFOS are two examples, are man-made chemicals that persist in the environment and humans for substantial amounts of time without breaking down and thus have been dubbed “forever chemicals.” This proposed rule represents the latest in a series of EPA actions targeting PFAS.

What Impact Will These Designations Have?

EPA proposes to list PFOA and PFOS as hazardous substances under CERCLA section 102(a). According to EPA, the listing will have three “direct” effects. First, any person in charge of a vessel or a facility must notify the national response center whenever there is a release of either chemical of greater than the reportable quantity, which is one pound. EPA noted that one pound is the default reportable quantity for all listed hazardous substances; the reportable quantity for PFOA and PFOS may be changed in the future, but any change would be subject to further notice-and-comment rulemaking. Second, whenever federal agencies

sell or transfer federally-owned real property, they must provide notice if either chemical was stored there for more than one year or was disposed of or released at the property. And third, the listing of PFOA and PFOS as hazardous substances requires the Department of Transportation to list and regulate the substances.

Potentially much more significant is what EPA is calling an “indirect” effect – this listing would allow EPA, as well as states and private parties, to recover the costs of cleaning up PFOA and PFOS contamination from potentially responsible parties via CERCLA. The anticipated impact of this “indirect” effect is why the Office of Management and Budget designated the proposed rule as “economically significant” – meaning it expects the rule to impose annual costs of at least \$100 million, thus triggering the requirement that EPA conduct a regulatory impact analysis before the rule goes into effect.

EPA justifies its proposed rule based on three lines of evidence. The first, which it calls “Chemical/Physical Characteristics,” focuses on the fact that PFOA and PFOS move easily from soil to groundwater, are water soluble, and take a substantial amount of time to naturally break down. The second line, referenced as “Toxicity and Toxicokinetics,” concerns the harmfulness of the chemicals to humans. Studies have shown associations between a variety of health problems and PFOA/PFOS, including effects on the immune system, the cardiovascular system, human development, and cancer. The final line of evidence is “Environmental Prevalence,” which focuses on the variety of media in which PFOA and PFAS can be found, as well as the fact that their resistance to breaking down naturally leads to their occurrence in a substantial number of sources.

The proposed rule involves EPA’s first ever interpretation of CERCLA section 102(a). In relevant part, that section gives EPA the authority to promulgate regulations designating as hazardous substances “such elements, compounds, mixtures, solutions, and substances which, when released into the environment, may present substantial danger to the public health or welfare or the environment.” The most significant aspect of EPA’s interpretation of this statutory section is EPA’s conclusion that it does not allow EPA to take cost into account when designating hazardous substances. That conclusion is based on the statutory language, an analysis of case law and statutory structure, and the fact that EPA would factor cost into consideration if it were to conduct a cleanup. EPA also specifically noted that it is taking public comment on the issue of how to consider costs, including its interpretation of CERCLA section 102(a), which costs and benefits should be considered, how to factor in the uncertainty of the number of enforcement actions that it describes as “indirect” costs, and more.

Next Steps

The document released by EPA is a pre-publication version. The next step for EPA will be to publish the proposed rule in the Federal Register. After that occurs – which EPA states will be in the next few weeks following the release of the pre-publication version – the document will be open for public comment for a period of 60 days.

EPA’s initial proposal does not appear to focus directly on water providers and wastewater treatment facilities, but EPA is in the early process of rule development and should continue to monitor PFAS/PFOS developments.

This proposed rule comes at a time when regulating PFAS is at the forefront of environmental regulation efforts. If it survives intact through the almost inevitable litigation it faces, it will change the way PFAS are

evaluated and could potentially lead to further actions by states such as California, which has shown a desire to regulate these chemicals as well.